(7)

No. 97-6146

In The

Supreme Court of the United States

October Term, 1997

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have all the hallmarks of a trial on guilt or innocence?

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OPINIONS BELOW

The opinion of the California Supreme Court is reported as *People v. Monge*, 16 Cal.4th 826, 66 Cal.Rptr. 853, 941 P.2d 1121 (1997), and is located in the Joint Appendix ("JA") at pages 49-131. The unpublished opinion of the California Court of Appeal is included at JA 40-48.

JURISDICTIONAL STATEMENT

The California Supreme Court issued its opinion on August 27, 1997. Petitioner filed a petition for writ of certiorari with this Court on September 29, 1997. The Court granted the writ on January 16, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1275(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy guarantee of the Fifth Amendment to the United States Constitution, the Due Process guarantee of the Fourteenth Amendment and California Penal Code §§ 667, 1170.12 and 1192.7.

In relevant part, the Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy . . . . "

The Fourteenth Amendment provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code §§ 667, 1170.12 and 1192.7 contain the California "three-strikes" law and are set forth in the Appendix attached to this brief.

STATEMENT OF THE CASE

The Charges.

On March 16, 1995, the Los Angeles County District Attorney filed a three count information against petitioner Angel Monge. (CT 14-17.)[1] Count one charged that on January 25, 1995, Mr. Monge employed a minor to transport marijuana in violation of California Health and Safety Code § 11361(a). (CT 14.) Counts two and three charged lesser offenses arising out of the same transaction: sale of marijuana and possession of marijuana for sale in violation of California Health and Safety Code §§ 11360(a) and 11359 respectively. (CT 15.)

The information also gave notice that the state would seek to prove several additional allegations which would dramatically increase Mr. Monge's sentence. First, the information alleged that he had been convicted of a serious felony, a "strike" within the meaning of the state's then recently enacted three-strikes law. (CT 16.) Second, it

[1] Citations to "CT" denote the Clerk's Transcript on Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT." Citations to the Joint Appendix are denoted "JA."

alleged that in connection with this same prior conviction, he had served a prison term. (CT 16.)

Mr. Monge pled not guilty to all charges and moved to bifurcate trial on the three-strikes and prior prison term allegations. (CT 20; RT 3.) Under state law, this meant that these portions of the trial would not occur unless and until the jury convicted him of the underlying offense. The trial court granted this motion. (RT 3.)

Trial On The Underlying Offense And The Enhancing Allegations.

At trial, the state introduced sufficient evidence to show that on January 25, 1995, Mr. Monge assisted a minor in selling $20.00 worth of marijuana to a team of six undercover officers. (RT 61-62, 66-90.) The jury convicted petitioner of the charged offenses. (RT 182-186; CT 82.) The formal trial on the prior conviction and prison term allegations then began. (CT 87.)

As noted, the state had charged Mr. Monge with having been convicted of a prior serious felony in violation of the three-strikes law. In particular, the state alleged that he had been convicted of a July 12, 1992, assault, a prior conviction within the meaning of California Penal Code §§ 667(b)-(i) and 1170.12(a)-(d). (CT 16.)[2]

Under California law, a prior assault will not expose a defendant to the three-strikes law unless the state

[2] Section 667 contains the three-strikes law enacted by the legislature in March of 1994. Section 1170.12 contains a substantively identical statute enacted by the voters in November of 1994.

proves it was committed in such a way as to constitute a "serious felony" as defined in Penal Code section 1192.7. It is not enough to introduce documentary evidence showing that a defendant was convicted of assault. Instead, the state must affirmatively prove how the assault was committed, establishing that the defendant either (1) personally used a dangerous or deadly weapon during the assault or (2) personally inflicted great bodily injury. *See* Cal. Penal Code § 1192.7(c)(8) and (c)(23); *People v. Rodriguez*, 17 Cal.4th 253, 261 (1997); *People v. Equarte*, 42 Cal.3d 456, 465 (1986).

Here, Mr. Monge pled not guilty to the prior conviction charge. Although he waived his statutory right to a jury, he affirmatively exercised his right to a bench trial on the allegation. (CT 20; RT 3, 187-188; JA 9-11, 15.) In an informal colloquy between the court and counsel, the prosecutor said that a stick was used in the prior assault. (RT 189; JA 12.) At the actual trial, however, the state introduced a single, four-page exhibit to carry its burden of proving that the prior conviction was a serious felony. (*See* Exhibit 1; CT 83-86; RT 192; JA 3-6, 16.)

This exhibit established two facts. First, it proved that on July 2, 1992 Mr. Monge was convicted of assault in violation of section 245(a)(1). (CT 85-86; JA 5-6.) Second, it proved that he served a prison term for this offense. (CT 84; JA 4.)

The state did not introduce any evidence to prove that a stick was used in the prior assault or that, if so, it was Mr. Monge who used it. (CT 83-86; RT 187-194; JA 3-6, 9-17.) The state did not introduce any evidence to show that Mr. Monge personally used any other object

during the assault which might be considered a dangerous or deadly weapon. (CT 83-86; RT 187-194; JA 3-6, 9-17.) The state did not introduce any evidence to prove that anyone, much less Mr. Monge, personally inflicted great bodily injury during the prior assault. (CT 83-86; RT 187-194; JA 3-6, 9-17.) Despite the dearth of such evidence, the trial court ruled that the state had presented sufficient evidence to prove that the prior assault was a serious felony as defined in section 1192.7. (CT 87; RT 193; JA 7, 16-17.)[3]

Sentencing.

At sentencing, the trial court imposed a five year term for the count one charge and stayed sentence on the lesser charges. (CT 239; JA 19.) Based entirely on its verdict in connection with the 1992 assault prior, the court then added five years to this term. (RT 239; JA 19.)

To this 10-year term, the court added one year for the prison term served in connection with the 1992 assault. (RT 240; JA 19.) The total term of imprisonment was 11 years. (RT 242; JA 22.) Petitioner timely appealed his conviction to the California Court of Appeal. (CT 89-90.)

The State Court's Finding Of Insufficiency.

While the appeal was pending, the state Court of Appeal recognized that the state had presented no evidence to prove that petitioner either (1) personally used a

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[3] The trial court also found sufficient evidence to prove that Mr. Monge served a prison term in connection with the assault. (RT 193; JA 16.) That finding is not at issue here.

dangerous or deadly weapon during the assault or (2) personally inflicted great bodily injury. (JA 27-29.) The court requested briefing from both parties as to whether there was sufficient evidence to sustain the serious felony charge. (JA 27-29.)

In response, the state candidly conceded that it had presented insufficient evidence to prove either element necessary to prove the prior was a serious felony within section 1192.7:

> As to the 1992 assault conviction . . . it would appear there is nothing in the record which proves appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7.

(*People v. Monge*, B094905, Respondent's Supplemental Brief of June 17, 1996 at 2-3; JA 33.) In its subsequent opinion, the Court of Appeal agreed that the state had presented insufficient evidence to sustain the charged allegation and ordered it stricken. (JA 41-44.)

The state asked the Court of Appeal for a second chance to "properly prove beyond a reasonable doubt . . . that appellant personally inflicted great bodily injury . . . and/or used a dangerous or deadly weapon . . . ." (*People v. Monge*, B094905, Respondent's Supplemental Brief of June 17, 1996 at 4-5; JA 35.) The appellate court refused, ruling that Double Jeopardy did not permit the state repeated attempts to muster sufficient evidence to meet its burden of proof. (*People v. Monge*, B094905, Unpublished Opinion at 5-7; JA 46.)

The state sought review. The California Supreme Court granted review and, in a 4-3 decision, reversed. It held that the Double Jeopardy Clause did permit the state repeated chances at proving its case. *People v. Monge*, 16 Cal.4th 826. This Court granted certiorari on January 16, 1998.

SUMMARY OF ARGUMENT

The state charged Mr. Monge with having committed a prior offense which brought him within the state's three-strikes law. If proven, the allegation would double Mr. Monge's prison sentence. At trial, the state had a full and unfettered opportunity to present evidence and carry its burden of proof. It failed and Mr. Monge was later acquitted. Now, alerted to the need for an improved presentation, the state wants a second chance to prove its case. The question presented is whether the Double Jeopardy Clause permits the state this second opportunity.

This question arises at the cross-roads of two lines of authority. The general rule, of course, is that the Double Jeopardy Clause prevents the state from retrying a defendant after an acquittal whether that acquittal occurs at trial or on appeal. *Burks v. United States*, 437 U.S. 1 (1978). In one series of cases, the Court has held that this general rule applies with full force to sentence enhancement trials which contain all the procedural hallmarks of trial. *See, e.g., Arizona v. Rumsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1981). In another series of cases, the Court has held that the protections of Double Jeopardy do not apply to traditional discretionary sentencing

proceedings to bar either a Government appeal or a longer sentence after a defendant obtains a reversal of his underlying conviction on appeal. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117 (1980); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Here, the state does not seek the right to appeal as in *DiFrancesco*. Nor does the state seek to impose a longer sentence after a defendant successfully appealed an underlying conviction as in *Pearce*. Instead, the state seeks a much greater power; it seeks to ignore an acquittal from one factfinder – be it a jury or an appellate court – so it can empanel another and try again.

A bare majority of the California Supreme Court authorized this practice. Noting that both *Rumsey* and *Bullington* involved sentence enhancement trials in capital cases, the state court cabined the rationale of those cases to the capital context. The court went on to allow the state a second bite at the apple. Although this case involved neither a state appeal, nor a longer sentence after defendant's underlying conviction had been reversed on appeal, the state court relied on the Double Jeopardy rule articulated in *DiFrancesco* and *Pearce* and applied to traditional sentencing hearings.

This reliance was fundamentally misplaced. The nature of a California three-strikes trial, and the role played by the factfinder in that trial, are completely different from the nature of a traditional sentencing hearing and the role played by the sentencer at that hearing. The scope of Double Jeopardy protection applicable to these two very different hearings must reflect this difference.

This Court has long recognized a distinction between the factfinder's role in determining guilt at a formal trial and the sentencer's role in exercising discretion to select an appropriate sentence at a traditional sentencing hearing. The factfinder's role is objective: it makes an historical determination as to whether the state has proven certain facts. In contrast, the sentencer's role is normative: it exercises discretion and selects an appropriate sentence. Because these roles are so different, this Court has exempted traditional sentencing hearings from many of the constitutional protections required in a criminal trial – such as confrontation, notice of the charges and Double Jeopardy.

For nearly half a century, however, this Court has maintained a parallel distinction between the factfinder's role in determining the truth of a sentence enhancement and the sentencer's role at sentencing. Like the factfinder at a trial on guilt or innocence, the factfinder in a sentence enhancement trial is making a discrete and objective finding of historical fact. Because this role is identical to the role of the factfinder at the trial on guilt or innocence, the Court has repeatedly held that many of the protections which apply to guilt/innocence determinations – such as confrontation and notice of the charges – also apply to formal trials on sentence enhancement allegations.

The Court's decisions in *Bullington* and *Rumsey* were straightforward applications of this principle in the Double Jeopardy context. The proceedings at issue in *Bullington* and *Rumsey* had all the hallmarks of trial, and the role played by the factfinder was identical to the role played by the factfinder in a trial on guilt or innocence.

Thus, Double Jeopardy was properly applied to those proceedings.

The role of the factfinder in a California three-strikes trial, and the nature of the trial itself, are also identical to a trial on guilt or innocence. A guilty verdict on a strikes allegation exposes a defendant to significant additional punishment above and beyond that prescribed for the current crime. The factfinder is making the same type of objective determination of historical fact typically made at a guilt/innocence trial. By state law, the protections of a criminal trial – including notice, a jury trial, proof beyond a reasonable doubt, the right to confrontation and the rules of evidence – all apply to that proceeding.

Under these circumstances, the Double Jeopardy Clause must apply as well. This result is consistent with the Court's longstanding distinction between sentence enhancement trials and traditional sentencing, it is consistent with *Bullington* and its progeny, and it is consistent with the vast weight of authority from lower courts applying *Bullington* in this same context.

The state was required to prove the allegation at issue in this case beyond a reasonable doubt. It failed. It should not be entitled to a second, third or fourth chance.

ARGUMENT

I. WHEN A DEFENDANT HAS FORMALLY BEEN TRIED FOR AND ACQUITTED OF A SENTENCE ENHANCEMENT THAT EXPOSED HIM TO AN ADDITIONAL FIVE YEARS IN STATE PRISON, AND THE SENTENCE ENHANCEMENT TRIAL HAD ALL THE HALLMARKS OF A GUILT/INNOCENCE TRIAL, THE DOUBLE JEOPARDY CLAUSE PRECLUDES THE STATE FROM A SECOND CHANCE TO PROVE ITS CASE.

The Double Jeopardy Clause consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. at 717. This case involves the first of these protections – the protection against reprosecution after acquittal.

Here, the state charged an allegation, had a full opportunity to prove its case beyond a reasonable doubt and failed. Whether the acquittal was by the jury or the reviewing court makes no difference. Once defendant was acquitted of the allegation, Double Jeopardy precluded the state from ignoring the verdict, empaneling a second, third or fourth jury, and seeking to prove the identical allegation beyond a reasonable doubt.

A. Because The Decision Of The Sentencer At A Traditional Sentencing Proceeding Is So Different From That Of The Factfinder At A Trial On Guilt Or Innocence, The Court Has Consistently Exempted Traditional Sentencing Proceedings From The Strict Constitutional Requirements Applied To Trials.

This Court has long recognized the fundamental distinction between the objective task of the factfinder in determining guilt and the subjective task of the sentencer in selecting an appropriate sentence. Both the nature of the determination made by the decisionmaker and the procedures which attend the decisionmaking process are entirely different.

In a trial on guilt or innocence, the factfinder is asked to make a straightforward "binary" determination as to whether the state has "prove[d] its case" against the defendant. *See Burks v. United States*, 437 U.S. at 15. In order to ensure the accuracy of this determination, a number of procedural safeguards apply. The state must provide notice of the charges. *See In re Ruffalo*, 390 U.S. 544, 550 (1968); *In re Oliver*, 333 U.S. 257, 273 (1947). The state's evidence is subject to confrontation. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The defendant must be allowed to present relevant evidence in his defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Finally, the state must prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970).

In contrast, the decisions made at a typical sentencing hearing are quite different. Unlike a trial on guilt or innocence, the sentencer does not decide whether the state has proved its case beyond a reasonable doubt.

Instead, the sentencer exercises a broad discretion in selecting an appropriate punishment from the range of punishments authorized by statute. The exercise of this discretion is "characteristically determined in large part on the basis of information . . . developed outside the courtroom. It is purely a judicial determination, and much more that goes into it is the result of inquiry that is nonadversary in nature." *United States v. DiFrancesco*, 449 U.S. at 136-137.

Thus, a sentencing determination is far different from the determination made at a formal guilt/innocence trial. Based on this difference, the Court has exempted traditional sentencing decisions from the strict constitutional requirements which govern guilt/innocence trials. The leading case to explain these differing procedures is *Williams v. New York*, 337 U.S. 241 (1949).

There, the Court explained that because of the normative nature of the typical sentencing decision, traditional sentencing hearings do not require many of the procedural protections applicable to a trial on guilt or innocence – such as notice, the right to confrontation and formal rules of evidence. *Williams v. New York*, 337 U.S. at 245-247. *See United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 635 (1997). To the contrary, a sentencing court "exercis[es] a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed . . . . " *Williams v. New York*, 337 U.S. at 246. Traditional sentencing thus relies on "out-of-court sources" and involves an inquiry "broad in scope, largely unlimited either as to the kind of information [considered] . . . or the source from which it may come." *Williams v. New York*, 337 U.S. at 250-251;

Nichols v. United States, 511 U.S. 738, 747 (1994). Moreover, at a true sentencing hearing the state need satisfy only the preponderance of the evidence standard. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986).

The Court has recognized this same distinction between formal trials and traditional sentencing in determining the scope of the Double Jeopardy Clause. Thus, when the state has failed to prove a criminal allegation at a formal trial where the rules of evidence apply, the state's burden of proof is beyond a reasonable doubt, and the factfinder's role is to determine whether the allegation is proved, Double Jeopardy bars the state from a second chance to prove that allegation beyond a reasonable doubt. *See, e.g., Burks v. United States*, 437 U.S. at 16-17; *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). This is so whether the defendant is acquitted at trial or by a reviewing court's finding of insufficient evidence. *Burks v. United States*, 437 U.S. at 16. Nor may the state appeal from an acquittal. *See Fong Foo v. United States*, 369 U.S. at 143.

Because of the differences between trial and sentencing, however, the Court has once again carved out an exception for the subjective determinations made at a sentencing hearing. When a defendant is sentenced at a hearing where the state's burden of proof is preponderance of the evidence, the formal rules of evidence do not apply, and the sentencer must exercise a broad discretion in selecting an appropriate sentence, Double Jeopardy will not bar a new sentencing hearing – and a more severe sentence – after a successful appeal. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*,

395 U.S. 711. Because of the relatively informal procedures attendant to such hearings, and the normative nature of the decision itself, "the pronouncement of sentence has never carried the finality that attaches to an acquittal." *United States v. DiFrancesco*, 449 U.S. at 133. Thus, Double Jeopardy will not bar an appeal by the Government of a sentence, at least where that appeal is premised on the existing record. *Id.* at 136-137.

The distinction between trial and sentencing procedures springs from the very different inquiries involved and determinations made at the two proceedings. The essential components of a traditional sentencing hearing – a lower standard of proof, an informal hearing where the rules of evidence do not apply and a wide ranging discretion in the sentencer to select an appropriate sentence – are fundamentally incompatible with the purpose of the Double Jeopardy Clause. When a decision has been reached after a hearing with these attributes "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' " *Bullington v. Missouri*, 451 U.S. at 443.

Justice Powell explained why this is so in his dissenting opinion in *Bullington* itself. There, Justice Powell noted that Double Jeopardy applies to proceedings on guilt or innocence because such questions involved "an objective truth." *Bullington v. Missouri*, 451 U.S. at 450 (Powell, J., dissenting). In contrast, "[t]he sentencer's function is not to discover a fact, but to mete out just deserts as he sees them." *Ibid.* Thus, while there is a rational way to review a factfinder's determination of "objective" fact, there is no "objective measure by which

the sentencer's decision can be deemed correct or erroneous . . . . " *Ibid.* Justice Powell reasoned that Double Jeopardy should not apply to sentencing because "the second jury's sentencing decision is as 'correct' as the first jury's." 451 U.S. at 451.[4]

In contrast, where a proceeding contains all the essential components of a criminal trial, and the factfinder is making a determination of historical fact, Double Jeopardy should apply. In that situation, not only has the jury been asked to determine the precise "objective" truth to which Justice Powell referred, but there is an "objective measure by which the . . . decision can be deemed correct or erroneous." 451 U.S. at 450. Moreover, since the state has no right to appeal an acquittal, no statutory procedure upsets the defendant's "expectation of finality in the original sentence."

Thus, in both the Due Process and Double Jeopardy areas, the Court has drawn a clear distinction between the constitutional rights applicable to trials on guilt or innocence and those applicable to traditional sentencing

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[4] Not only do the hallmarks of a typical sentencing hearing make Double Jeopardy difficult to apply, but they undercut any expectation of finality a defendant might otherwise have in his sentence. Thus, one relevant hallmark the Court has examined to determine the applicability of Double Jeopardy is whether the state has been afforded the right to appeal a particular sentence. Where such a right exists, a defendant's "expectation of finality in the original sentence" is undercut and a new sentencing is permissible. *United States v. DiFrancesco*, 449 U.S. at 136-137, 139. *See Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985).

hearings. In both areas, the Court has exempted traditional sentencing proceedings from the constitutional requirements which govern criminal trials. This exemption is not based on the label attached to the proceeding; instead, it is grounded in a functional analysis of the significantly different determinations being made.

B. Where The Decision Made By The Factfinder At A Sentence Enhancement Trial Is Identical To That Made At A Trial On Guilt Or Innocence, And The Proceeding Has All The Hallmarks Of Trial, Double Jeopardy Must Apply.

In this case, the sentence enhancement trial is identical to a formal guilt/innocence trial in all but name. The procedural hallmarks, substantive determination and penal consequences made at a strikes trial are identical to a trial on guilt or innocence.

Over the last 50 years the Court has, on many occasions, addressed the scope of constitutional protections to be applied to these types of proceedings. While the label attached to a sentence enhancement proceeding may be a factor in assessing the scope of constitutional protection to be applied, it is not dispositive. Instead, in making this assessment the Court has always taken the same functional approach discussed above, examining the substance of the proceeding and the nature of the determination made at that proceeding. The Court has applied this approach in connection with a series of constitutional rights – including the right to notice, counsel, confrontation, and to present evidence. Uniformly, the Court has rejected the proposition that the exceptions carved out for traditional sentencing hearings should be

extended to sentence enhancement trials. The Court's Double Jeopardy cases represent a straightforward application of this same approach.

1. In holding that many constitutional protections available to a defendant at a criminal trial are equally available at a sentence enhancement trial, the Court routinely examines the substance and nature of the sentence enhancement proceeding.

As noted above, the Court has exempted traditional sentencing decisions from many of the strict constitutional requirements which govern guilt/innocence trials. The Court has, however, consistently rejected the proposition that the exceptions carved out for traditional sentencing hearings should be extended to sentence enhancement trials. Instead, the Court has reached precisely the opposite conclusion, holding that many constitutional protections available to defendants at trial also apply to sentence enhancement trials. *See, e.g., Specht v. Patterson*, 386 U.S. 605 (1967); *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Chandler v. Fretag*, 348 U.S. 3 (1954). *See also Oyler v. Boles*, 368 U.S. 448 (1962).

In *Specht v. Patterson*, 386 U.S. 605, for example, the Court addressed a Colorado sentence enhancement statute. There, defendant was convicted of an offense which carried a maximum penalty of ten years in prison. The enhancement statute at issue authorized the trial judge to make a post-trial inquiry as to whether defendant posed a "threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. If the trial court found this was true, it could impose additional

punishment, including a life term. *Ibid*. This finding could be made without a formal hearing, without notice and based on psychiatric reports. 386 U.S. at 608. On appeal, petitioner argued that Due Process entitled him to notice of the charges and an opportunity to confront the evidence against him.

Before this Court, the state argued that the factual finding authorized by the statute was merely part of the "determination as to what sentence is imposed." *Specht v. Patterson*, No. 831, Brief for Respondent at 19. The post-trial proceeding "is not to convict, but one to impose sentence . . . . " *Id*. at 7. It was simply "a statute which permits imposition of a sentence." *Id*. at 13. Citing *Williams v. New York*, 337 U.S. 241, the state argued that the exemption applied to traditional sentencing hearings should extend to the enhancement trial as well. *Specht v. Patterson*, No. 831, Brief for Respondent at 8-13.

This Court explicitly rejected the proffered analogy to traditional sentencing hearings. Instead, the Court took a functional approach, looking beyond the nomenclature attached to the proceeding at issue. In the enhancement trial at issue there, the factfinder was performing a classic guilt/innocence function, making "a new finding of fact- . . . that was not an ingredient of the offense charged." 386 U.S. at 608. The factfinder's role in making a "new finding of fact" on which the state hinged far greater punishment made the statute at issue in *Specht* "radically different" from the typical sentencing hearing considered in *Williams v. New York*, 337 U.S. 241. *Specht v. Patterson*, 386 U.S. at 608. Thus, Due Process rights to notice and confrontation – rights which *Williams* had established did

not apply to sentencing proceedings – would apply to the enhancement scheme at issue in *Specht*. *Id.* at 610-611.

The Court reached the same result in *Chandler v. Fretag*, 348 U.S. 3. There, the Court also rejected the proposition that recidivist enhancement trials should be treated the same as traditional sentencing hearings. *Chandler* involved a Tennessee enhancement statute which, like the statute in *Specht*, required the factfinder to make a new finding of fact at a sentence enhancement trial. Like *Specht*, the state hinged significant additional punishment on this new finding. 348 U.S. at 5, 8-9. On appeal, defendant argued he had been denied his Due Process right to be heard through counsel.

Before this Court, the state argued that the statute "goes to punishment only." *Chandler v. Fretag*, No. 39, Brief for Respondent at 6. Once again the state cited *Williams v. New York*, 337 U.S. 237 for the proposition "that the procedural requirements of due process for sentencing are entirely different to those applicable to determining the guilt or innocence of a Defendant." *Chandler v. Fretag*, No. 39, Brief for Respondent at 8. Once again, the state relied on *Williams* to argue that the constitutional rights applicable to a recidivist enhancement trial should be the same as those applicable to traditional sentencing hearings. *Chandler v. Fretag*, No. 39, Brief for Respondent at 8-9. Once again, however, this Court rejected the proffered analogy between sentence enhancement trials and traditional sentencing proceedings. 348 U.S. at 8-10. *Accord Oyler v. Boles*, 368 U.S. at 452 (Due

Process requirement of notice and an opportunity to be heard applies to West Virginia recidivist statute).[5]

The Court took an analytically similar approach in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There, the Court recognized that although a state had substantial latitude in defining both crimes and sentencing procedures, it could not avoid the constitutional protections applicable to criminal trials by the expedient of recasting certain elements of the crime as "sentencing factors." 421 U.S. at 698-699. Instead, the reach of the constitution depended on "substance rather than . . . formalism . . . [and] requires an analysis that looks to the operation and effect of the law as applied and enforced by the State." *Ibid.*

The common thread in *Specht*, *Chandler* and *Mullaney* is the Court's refusal to give dispositive effect to the label attached to a particular proceeding in determining the appropriate reach of the federal constitution. Instead, the Court has properly focused on the "substance" of the proceeding as it is "applied and enforced by the State."

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[5] The Court's decision in *Chewning v. Cunningham*, 368 U.S. 443 is similar. There, the state argued that a Virginia recidivist proceeding was simply a proceeding to impose a "stiffened penalty." *Chewning v. Cunningham*, No. 63, Brief for Respondent at 18, 19-20. The Court rejected this argument, applying the same standard for appointment of counsel that it applied in guilt/innocence trials. 368 U.S. at 447.

2. The Court's Double Jeopardy cases take the same approach, holding Double Jeopardy applicable to sentence enhancement trials whose substance and nature are identical to a guilt/innocence trial.

Bullington v. Missouri, 451 U.S. 430 and *Arizona v. Rumsey*, 467 U.S. 203 fit seamlessly into the broad tapestry of *Specht*, *Chandler* and *Mullaney*. Both *Bullington* and *Rumsey* looked at the substance of the particular proceeding at issue to determine whether it would be treated as a traditional sentencing hearing or as a trial on the question of guilt or innocence.

To be sure, *Bullington* marked the first time the Court was faced with deciding whether the Double Jeopardy exception carved out for traditional normative sentencing hearings (the *Pearce/DiFrancesco* rule) would extend to enhancement trials containing all the hallmarks of a trial on guilt or innocence. In *Bullington*, the Court explicitly rejected extension of the *Pearce/DiFrancesco* rule to formal sentence enhancement trials.

There, defendant was convicted of murder. At a bifurcated hearing the state sought to prove the facts necessary for a death sentence. The jury imposed a life sentence. Defendant sought and received a new trial as to his underlying conviction. At the new trial, the state again sought to prove the facts necessary for a death sentence. Defendant argued that Double Jeopardy precluded the state from a second chance to prove its case.

Before this Court, Missouri proffered a mirror image of the arguments rejected in *Specht* and *Chandler*. Citing *North Carolina v. Pearce*, 395 U.S. 711, the state argued that

the scope of Double Jeopardy protections applicable to the sentence enhancement trial at issue in *Bullington* should be governed by the limited Double Jeopardy protections applicable to a traditional sentencing hearing. *Bullington v. Missouri*, No. 79-6740, Brief for Respondent at 9-18. The state cited *United States v. DiFrancesco*, 449 U.S. 117 and argued that the Double Jeopardy Clause did not apply to facts found at "sentencing" hearings. *Bullington v. Missouri*, No. 79-6740, Supplemental Brief of Respondent at 1-2.

As in *Specht* and *Chandler*, the Court once again rejected the argument that sentence enhancement trials and traditional sentencing hearings were functional equivalents. The fact that the hearing was a "sentencing hearing" was irrelevant; the key inquiry was whether the sentence proceedings had "the hallmarks of the trial on guilt or innocence." 451 U.S. at 439.[6]

Applying this functional approach, the Court noted that under Missouri law a separate hearing was required to establish the predicate facts. 451 U.S. at 438. At the hearing, the state was required to prove its case beyond a reasonable doubt. 451 U.S. at 438. Under state law, the

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[6] The Court's refusal to afford dispositive weight to the label attached to the proceeding was not only consistent with *Specht*, *Chandler* and *Mullaney*, but the Court's longstanding observation that "in the Double Jeopardy context it is the substance of the action that is controlling, and not the label given that action." *United States v. DiFrancesco*, 449 U.S. at 142. *Accord United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

hearing involved opening statements, introduction of evidence, closing arguments and the sentencer was presented with only two sentencing options. 451 U.S. at 438 and n.10. The state had no right to appeal a contrary verdict. In concluding that Double Jeopardy did indeed apply to the Missouri sentencing hearing at issue, the Court observed that the state mandated procedures "differ[] significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing." 451 U.S. at 438.[7]

This observation was entirely accurate. None of the cases "where the Double Jeopardy Clause has been held inapplicable to sentencing" invoived the hallmarks of a trial on guilt or innocence. *See United States v. DiFrancesco*, 449 U.S. 117; *North Carolina v. Pearce*, 395 U.S. 711; *Chaffin v. Stynchcombe*, 412 U.S. 17; *Stroud v. United States*, 251 U.S. 15 (1919). In fact, *Bullington* distinguished *DiFrancesco*, *Pearce*, *Chaffin* and *Stroud* precisely on this basis. 451 U.S. at 438-439, 441.

Equally important, though *Bullington* was a capital case, the Court's precedents reject the proposition that Double Jeopardy mandates one rule for capital cases and a different rule for non-capital cases. In *Stroud v. United States*, 251 U.S. 15, defendant was tried for a capital crime

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[7] In the language of *Specht*, the penalty enhancement trial at issue in *Bullington* was "radically different" from the typical sentencing proceeding to which the state was analogizing. This difference existed not only with respect to the nature of the determination which was being made (as in *Specht*), but with the procedures associated with that determination as well.

and given a life sentence. He appealed and his conviction was reversed. At his retrial, the death sentence was imposed. Even though it was a capital case, *Stroud* found no Double Jeopardy bar to the increased sentence. 251 U.S. at 16-18.

Of course, had *Bullington* rested on the proposition that Double Jeopardy mandates one rule for capital cases and a different rule for non-capital cases, it would have had to overrule *Stroud*. Significantly, however, it did not. Instead, *Bullington* took pains to distinguish *Stroud* as a case in which the penalty trial – unlike *Bullington* – "did not have the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. at 439.

Nor is there anything in the text of the Double Jeopardy Clause itself, or the history of the Clause, which supports a distinction between capital and non-capital cases. The finality concerns of the Double Jeopardy Clause have never turned on the severity of a concededly penal consequence. *See, e.g., In re Bradley*, 318 U.S. 50 (1943) (Double Jeopardy applicable to a $500 fine); *Ex parte Lange*, 18 Wall. 163 (1874) (Double Jeopardy applicable to a $200 fine). Instead, they properly turn on the nature of the proceeding which leads to that penal consequence.

Nothing in *Bullington* suggests it departed from this basic approach. Indeed, as Justice Powell noted in his dissenting opinion in *Bullington* itself, "the Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." 451 U.S. at 451. Justice Powell was correct.

Bullington did not rely on the Court's Eighth Amendment "death is different" jurisprudence, it relied on *Specht v. Patterson*, 386 U.S. 605. *Bullington v. Missouri*, 451 U.S. at 446.

This Court has never departed from *Bullington*. Only three years later, Justice O'Connor wrote for a 7-2 majority and applied *Bullington*'s "hallmarks of trial" test to the Arizona capital sentencing scheme. *Arizona v. Rumsey*, 467 U.S. 203. In *Rumsey*, the Court held Double Jeopardy applicable to a sentence enhancement trial where the state had the burden of proof beyond a reasonable doubt, the rules of evidence applied, and the factfinder had only two options.

Moreover, in a variety of other contexts applying the Double Jeopardy Clause, the Court has again and again looked at the hallmarks of a particular proceeding and the role of the decisionmaker in determining whether Double Jeopardy applied to that proceeding. *See, e.g., United States v. Hudson*, ___ U.S. ___, 118 S.Ct. 488, 495-496 (1998) (Double Jeopardy does not bar criminal proceedings based on conduct which was the subject of an earlier monetary penalty where the monetary penalty was determined in an "administrative determination" rather than "a judicial trial," and it involved no imprisonment); *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996) (in concluding that Double Jeopardy did not apply to civil forfeitures, the Court examined the "procedural mechanisms governing forfeitures" including the absence of any notice requirement, the availability of a "summary administrative procedure" to resolve the issue and a minimal "probable cause" burden of proof); *Witte v. United States*, 515 U.S. 389, 400-401 (1995) (Double Jeopardy does

not bar conviction for an offense based on conduct considered at sentencing in an unrelated case, where the prior use of the conduct did not expose the defendant to additional punishment "outside the range authorized by statute" and "authoriz[ed] the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial . . . . "); *United States v. Dixon*, 509 U.S. 688, 696 (1993) (Double Jeopardy applies to contempt hearing where the factfinder's role is to determine culpability for a "crime in the ordinary sense," and defendant had a right to notice of the charges, present a defense, assistance of counsel and proof beyond a reasonable doubt.)[8]

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[8] That Double Jeopardy may apply to a particular proceeding does not mean that other rights applicable at a guilt/innocence trial must apply. To the contrary, the Court has made clear that Double Jeopardy has a broader reach than many other rights, such as the right to a jury trial. *Compare Walton v. Arizona*, 497 U.S. 639 (1990) (no right to jury trial at Arizona capital sentencing proceeding) *with Arizona v. Rumsey*, 467 U.S. 203 (Double Jeopardy applies to Arizona capital sentencing proceeding); *compare McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in juvenile proceedings) *with Breed v. Jones*, 421 U.S. 519 (1975) (Double Jeopardy applies to juvenile proceedings); *compare Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (no right to jury trial for offense punishable by six months in prison or less) *with Robinson v. Neil*, 409 U.S. 505 (1973) (Double Jeopardy applies to petty crime prosecutions).

This result is sound. There are varied proceedings in which there is no constitutional right to a jury trial. A conclusion that the jury trial right does not attach to these proceedings does not mean that the state is permitted multiple opportunities to prove its case. The Court has recognized this precise point. *See Breed v. Jones*, 421 U.S. at 528, n.10.

From a practical perspective, the functional approach applied in *Bullington* and its progeny makes eminent sense. Those cases where the Court has held Double Jeopardy inapplicable to sentencing proceedings uniformly involve a normative determination which is, and should be, outside the scope of the Double Jeopardy Clause. In that situation, "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'" *Bullington v. Missouri*, 451 U.S. at 443. Put another way, Double Jeopardy does not apply to traditional discretionary sentencing because there is no "objective measure by which the sentencer's decision can be deemed correct or erroneous . . . . " *Bullington v. Missouri*, 451 U.S. at 450 (Powell, J., dissenting).

When the factfinder is not making a normative determination, however, but is instead making an objective determination of historical fact, this rationale for refusing to extend Double Jeopardy simply does not apply. Thus, when a criminal statute (1) exposes a defendant to significantly greater punishment if the state proves certain predicate facts, (2) provides for a fully adversarial trial on those facts just as in a guilt/innocence trial, including the requirement of proof beyond a reasonable doubt, and (3) sharply confines the factfinder's determination to "true" or "false," the state has effectively dispensed with those critical attributes of a "sentencing hearing" on which this Court has always relied to find that Double Jeopardy does not apply. In this situation, a finding of insufficient evidence by either the factfinder or the appellate court does indeed "constitute a decision to the effect that the

government has failed to prove its case." *Burks v. United States*, 437 U.S. at 15.

In sum, while the Court has carved out an exception to the general scope of the Double Jeopardy Clause for traditional sentencing proceedings, the rationale for that exception has no application to formal sentence enhancement trials. *Bullington* and *Rumsey* recognized this basic point. Where the factfinder at a sentence enhancement trial must make an objective finding of fact which exposes a defendant to significantly increased punishment, and where that finding is deemed so important that the attendant hearing has all the hallmarks of a guilt/innocence trial, the state is not entitled to repeated chances to prove its case after the defendant has once been acquitted.

C. In Deciding Whether Double Jeopardy Applies To A Sentence Enhancement Trial, The Vast Majority of Jurisdictions Apply *Bullington's* "Hallmarks Of Trial" Test.

Both *Bullington* and *Rumsey* involved capital sentencing proceedings. This Court has not had occasion to hold that the analysis in those cases applied equally to non-capital cases. *See Caspari v. Bohlen*, 510 U.S. 383, 397 (1994); *Lockhart v. Nelson*, 488 U.S. 33, 37-38, n.6 (1988). The Court has noted on a number of occasions, however, that state courts "hold the initial responsibility for vindicating constitutional rights." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.16 (1986); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Thus,

though certainly not dispositive on the question, the considered opinions of lower courts throughout the country should not be ignored in this Court's decisionmaking process. *See McKeiver v. Pennsylvania*, 403 U.S. at 548-549 (in determining the scope of the right to a jury trial, the Court examines the weight of authority from the lower courts); *Baldwin v. New York*, 399 U.S. 66, 71-72 and n.18 (1970) (same); *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (in determining the scope of Double Jeopardy Clause, the Court examines the weight of authority from the lower courts); *Moore v. Missouri*, 159 U.S. 673, 676-677 (1895) (same).

In her dissenting opinion below, Justice Werdegar – joined by Justices Mosk and Kennard – correctly concluded that the majority of jurisdictions have embraced the functional "hallmarks of trial" approach set forth in *Bullington*. *People v. Monge*, 16 Cal.4th at 869; JA 114. Thus, a holding that the *Bullington* formulation applies to sentence enhancement trials would not impact existing practice in the vast majority of jurisdictions, it would simply confirm it.

1. The majority rule.

The general rule throughout the country is that when an enhancement proceeding provides procedures and requires proof "like the trial on the question of guilt or innocence," Double Jeopardy applies and a finding of insufficient evidence will preclude retrial. *See, e.g., State v. Hennings*, 100 Wash.2d 379, 670 P.2d 256, 257-262 (Wash. 1983); *Cooper v. State*, 631 S.W.2d 508, 514 (Tex. 1982); *People v. Quintana*, 634 P.2d 413, 417-419 (Colo. 1981); *State v. Hulse*, 785 S.W.2d 373, 376 (Tenn. 1989); *Reed v. State*, 581 S.W.2d 145, 149-151 (Tenn. 1978); *Bowman v. State*, 314 Md. 725, 552 A.2d 1303, 1309-1310 (Md. 1989); *Davis v. Commonwealth*, 899 S.W.2d 487, 490 (Ky. 1995); *Poore v. State*, 685 N.E.2d 36, 39 (Ind. 1997); *State v. Aspen*, 412 N.W.2d 881, 883-885 (S.D. 1987). *Cf. Debussi v. State*, 453 So.2d 1030, 1033-1034 (Miss. 1984) (applying *Bullington's* hallmarks of trial test to conclude that Double Jeopardy Clause of Mississippi Constitution barred retrial of enhancement allegation); *State v. Ledbetter*, 240 Conn. 317, 692 A.2d 713, 717-718 (1997) (state concedes Double Jeopardy applies to habitual offender statute which is entirely trial-like, but state supreme court does not address the issue because it was waived).

The Washington Supreme Court's decision in *State v. Hennings*, 670 P.2d 256, is typical. There, defendant was charged with robbery and a habitual offender allegation. The factfinder at trial acquitted on the habitual offender charge. Under Washington law, a habitual offender finding exposed defendant to a life term. The state was required to prove the allegation beyond a reasonable doubt at a formal trial and the factfinder was being asked to decide a straightforward question of historical fact. Under these circumstances, the court "focus[ed] on the nature of the proceeding," applied *Bullington*, and concluded that Double Jeopardy barred a retrial: "it is not the labels placed upon those proceedings that is important, but the opportunity the State had to present its evidence against the defendant." 670 P.2d at 261.

Of course, as Justice Werdegar also noted, application of *Bullington's* hallmarks of trial test will not always result in a conclusion that Double Jeopardy applies to the

proceeding at issue. *People v. Monge*, 16 Cal.4th at 866; JA 109. The central purpose of the test is to distinguish trial-like proceedings at which Double Jeopardy should apply from the type of informal hearings where "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' " *Bullington v. Missouri*, 451 U.S. at 443. Thus, a significant number of courts have faithfully applied *Bullington*'s hallmarks test and held Double Jeopardy inapplicable to enhancement proceedings which did **not** provide procedures and require proof "like the trial on the question of guilt or innocence." *See, e.g., People v. Sailor*, 65 N.Y.2d 224, 235 (N.Y. 1985); *People v. Levin*, 157 Ill.2d 138, 623 N.E.2d 317, 325-327 (Ill. 1993); *Olsen v. State*, 691 So.2d 17, 18 (Fla. 1997); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385, 387-388 (N.C. 1985); *State v. Sowards*, 147 Ariz. 156, 709 P.2d 513, 515-516 (1985); *Fitzpatrick v. State*, 194 Mont. 310, 638 P.2d 1002, 1017 (1981).[9]

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[9] The federal courts reflect a similar pattern. Of course, federal courts may no longer resolve this issue in federal habeas proceedings because of the new rule bar of *Teague v. Lane*, 489 U.S. 288 (1989). *See Caspari v. Bohlen*, 510 U.S. 383. Nevertheless, prior to *Caspari*, the weight of authority in the federal courts applied *Bullington*'s hallmarks of trial test. When an enhancement proceeding provided procedures and required proof like the trial on the question of guilt or innocence, Double Jeopardy applied. *See, e.g., Bohlen v. Caspari*, 979 F.2d 109, 113 (8th Cir. 1992), *overruled on other grounds Caspari v. Bohlen*, 510 U.S. 383; *Durosko v. Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 495 U.S. 907 (1990); *Nelson v. Lockhart*, 828 F.2d 446, 449-451 and n.7 (8th Cir. 1987), *overruled on other grounds Lockhart v. Nelson*, 488 U.S. 33; *Briggs v. Procunier*, 764 F.2d 368, 371-373 (5th Cir. 1985); *French v. Estelle*, 692 F.2d 1021, 1023-1025 (5th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983). When the proceeding does not contain the hallmarks of trial, Double Jeopardy does not apply. *See, e.g., Wilmer v. Johnson*, 30 F.3d 451, 458 (3d Cir.), *cert. denied*, 513 U.S. 970 (1994).

People v. Sailor, 65 N.Y.2d 224 is typical of these cases. There, the New York Court of Appeals applied the *Bullington* formulation and concluded that Double Jeopardy would not apply to New York's persistent felon statute. That statute allowed for enhanced punishment if the court 1) found that defendant had committed two or more prior felonies and 2) reached the subjective conclusion that extended imprisonment was warranted by defendant's "history and character . . . and the nature and circumstances of his criminal conduct . . . . " 65 N.Y.2d at 235.

In concluding that Double Jeopardy did not bar a retrial, the court noted that the procedural safeguards associated with persistent felon status "are in many respects less like the procedural safeguards at trial than those employed in [*Bullington*] . . . . " 65 N.Y.2d at 235. The broad inquiry into defendant's "history and character" need only be proved by a preponderance of the evidence, the rules of evidence did not apply to this inquiry, and a defendant wishing to dispute the charge had to specify what he was disputing and what evidence he planned to use. 65 N.Y.2d at 235. Moreover, in determining whether defendant was a habitual offender, the factfinder had – by statute – a broad discretion to refuse to make the finding even where the evidence compelled it. 65 N.Y.2d at 234.[10]

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[10] *Accord People v. Levin*, 623 N.E.2d at 325-327 (Double Jeopardy inapplicable to state procedure where rules of evidence did not apply and "[t]he state had no burden to prove

It is thus clear that in deciding whether Double Jeopardy applies to their enhancement statutes, courts throughout the country have relied upon the "hallmarks of trial" framework articulated in *Bullington*. While the conclusions may vary depending on the particular hallmarks involved, the analysis remains the same; these courts have made a determination as to whether the proceedings were sufficiently trial-like to invoke Double Jeopardy protections. Application of the *Bullington* approach would simply confirm this practice.[11]

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a defendant's prior convictions beyond a reasonable doubt."); *Olsen v. State*, 691 So.2d at 18 (permitting retrial where habitual offender statute – Fla. Stat. § 775.084(3)(a)(4) – permitted state to prove facts "by a preponderance of the evidence"); *State v. Jones*, 336 S.E.2d at 387-388 (permitting retrial where statute allowed state to prove facts by a preponderance of the evidence, rules of evidence did not apply and sentencer exercised subjective discretion in reaching conclusion); *State v. Sowards*, 709 P.2d at 515 (permitting retrial where enhancement statute permitted state to prove facts by a preponderance of the evidence and where factfinder retained broad sentencing discretion). *Cf. Fitzpatrick v. State*, 638 P.2d at 1017 (Double Jeopardy not applied to capital sentencing which lacks the hallmarks of trial and allows state to prove facts by a preponderance of the evidence).

[11] Without specifying whether the bar was premised on the Double Jeopardy Clause, a number of other jurisdictions have held that insufficient evidence bars retrial of sentence enhancement allegations containing all the hallmarks of trial. *See, e.g., State v. Barlowe*, 242 Iowa 714, 46 N.W.2d 725, 731 (1951); *Cooper v. State*, 810 P.2d 1303, 1306 (Okla. 1991). Other states have reached this same result by relying on state statutes. *See, e.g., State v. Theriault*, 187 Wis.2d 125, 522 N.W.2d 254, 258 (1994). In these states too, the hallmarks of trial test would not alter existing practice.

2. The minority rule.

Three state jurisdictions have addressed the issue and departed from the majority rule described above. *State v. Cobb*, 875 S.W.2d 533 (Mo. 1994); *People v. Aragon*, 116 N.M. 267, 861 P.2d 948 (N.M. 1993); *Durham v. State*, 464 N.E.2d 321 (Ind. 1984).

Two points are worth noting. First, both *Cobb* and *Durham* contain strong dissents on this very issue. *See State v. Cobb*, 875 S.W.2d at 537-539 (Limbaugh, J., dissenting); *Durham v. State*, 464 N.E.2d at 325-326 (DeBruler, J., dissenting). Second, the Indiana Supreme Court has overruled the 3-2 decision in *Durham*, applied *Bullington*'s hallmarks of trial test, and unanimously held that Double Jeopardy does apply to Indiana's trial-like sentence enhancements. *Poore v. State*, 685 N.E.2d at 39; *Bell v. State*, 622 N.E.2d 450, 456 (Ind. 1993).[12]

Similarly, in those states which have not yet addressed the question, existing practice would also be unaffected. Most have habitual offender proceedings which either permit findings without trial-like hallmarks, such as proof beyond a reasonable doubt, or require a sentencing-like subjective determination to be made as to the "appropriateness" of a habitual offender finding. *See, e.g.*, Alaska Stat. § 12.55.025(i) and 12.55.145; Mich. Comp. Laws Ann. § 769.13 and *People v. Zinn*, 217 Mich.App. 340, 551 N.W.2d 704, 707-708 (1996); Minn. Stat. Ann. § 609.15 and *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996); *Clark v. State*, 851 P.2d 426, 427-429 (Nev. 1993); N.D. Crim. Code § 12.1-32-09; Or. Rev. Stat. § 161.725 and *State v. Sanders*, 35 Or.App. 503, 582 P.2d 22, 24 (1978); 42 Pa. Cons. Stat. Ann. § 9714; R.I. Gen. Laws § 12-19-21.

[12] Two federal circuits – one in dictum and one in an alternative holding – have departed from the majority rule. *See Denton v. Duckworth*, 873 F.2d 144, 147-148 (7th Cir. 1989)

D. Because California's Sentence Enhancement Scheme Contains All The Hallmarks Of A Guilt/Innocence Trial, Requires The Factfinder To Convict Or Acquit Of The Charge And Exposes The Defendant To Significant Enhanced Punishment, Double Jeopardy Applies To These Proceedings.

Applying the *Bullington* formulation to the California sentence enhancement scheme is relatively straightforward. The three-strikes charge at issue here provides a useful example.

When a defendant is convicted of an offense in California, the court imposes sentence by selecting from among three legislatively prescribed terms. *See* Cal. Penal Code § 1170(a)(3). Here, for example, the trial court was required to choose between a "three, five or seven year [ ]" term for the underlying offense. Cal. Health & Safety Code § 11361(a). The court selected the middle term – five years. (RT 239; JA 19.)

Pursuant to the three strikes law, when the state proves that a defendant has one prior conviction which qualifies as a strike, the sentence "shall be twice the term otherwise provided as punishment for the current felony conviction." Cal. Pen. Code § 667(e)(1). When the state proves that a defendant has two prior convictions which qualify as strikes, the sentence is the greater of (1) "three times the term otherwise provided as punishment" or (2) "[i]mprisonment in the state prison for 25 years." Cal. Pen. Code § 667(e)(2)(A)(i) and (ii).

(dictum re Indiana statute); *Linam v. Green*, 685 F.2d 369, 373, 376 (10th Cir. 1982) (alternative holding).

Because of the extraordinarily severe penal consequences which follow a guilty verdict on these allegations, the California legislature has made a considered judgment that trials on these allegations be conducted with the same strict procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence.

For example, in connection with the strikes allegation in this case – and as with any criminal offense – the law requires that defendants be given formal notice of and arraignment on the charges. *See* Cal. Pen. Code § 667(c), (g); Pen. Code § 1025. Similarly, as with any criminal offense, the defendant is entitled to a formal adversarial trial on the allegation. This includes not only the right to confront and present evidence, but the right to a jury trial as well. *See* Cal. Pen. Code §§ 969½, 1025, 1158; *People v. Reed*, 13 Cal.4th 217, 228, n.5 (1996); *In re Yurko*, 10 Cal.3d 857, 862-863 (1974). Unless a party moves to bifurcate trial on the strike allegations, the jury trial on these charges will occur at the same time as trial on the charged offenses. *See People v. Calderon*, 9 Cal.4th 69 (1994).

At this trial, whether bifurcated or not, the formal rules of evidence apply. *See People v. Meyers*, 5 Cal.4th 1193, 1201 (1993). Moreover, defendants are entitled to a special verdict on each prior conviction or prison term alleged. *See* Pen. Code § 1158. The jury has only two choices; it must either acquit of the charge or find that the defendant suffered the prior conviction. *Ibid.*

Finally, the prosecution must prove each element of a prior conviction habitual offender allegation true beyond a reasonable doubt. *People v. Tenner*, 6 Cal.4th 559, 566

(1993); *People v. Morton*, 41 Cal.2d 536, 539 (1953). In California, the state's obligation to "shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt" is a "cardinal principle of criminal jurisprudence." *People v. Tenner*, 6 Cal.4th at 566. If the state fails to meet this burden, and the defendant is acquitted of the allegation, the state may not appeal. Cal. Pen. Code § 1238; *People v. Smith*, 33 Cal.3d 596, 600 (1983) (state may appeal only when authorized by statute).

Of course, this constellation of protections is identical to that provided during the trial on guilt or innocence. Justice Chin, who wrote for the three-justice plurality below, recognized that because the defendant had a right to counsel, notice, an opportunity to be heard, and proof beyond a reasonable doubt a "section 1025 trial at which a California jury determines the truth of a prior conviction allegation . . . has 'the hallmarks of the trial on guilt or innocence.' " *People v. Monge*, 16 Cal.4th at 836; JA 60. Justice Werdegar, writing for the three-justice dissent, agreed. *People v. Monge*, 16 Cal.4th at 870; JA 116-117. Thus, as the California Supreme Court has itself concluded, the procedures which attend a sentence enhancement trial under California law are in all respects **identical** to those that apply to the trial on guilt and innocence.

The role of the factfinder in a sentence enhancement trial is also identical to that of the factfinder in the guilt/innocence trial. As Justice Chin recognized, at an enhancement trial – just as at a trial on guilt – the "trier of fact faces a choice between two alternatives." *People v. Monge*, 16 Cal.4th at 836; JA 61. Justice Werdegar once again

agreed, noting that the jury "is limited to two alternatives . . . . " *People v. Monge*, 16 Cal.4th at 870; JA 116.

On both scores, the formal trial on enhancements contrasts starkly with a traditional sentencing hearing in California. First, the sentencer's role at a typical California sentencing hearing is completely different from the factfinder's role at a typical sentence enhancement trial.

At a typical sentencing hearing, the trial judge considers the information presented and exercises a "broad discretion to determine whether an eligible defendant is suitable for probation . . . . " *People v. Welch*, 5 Cal.4th 228, 233 (1993). If probation is imposed, the court has an equally broad discretion to determine "what conditions should be imposed." *Ibid*. If probation is not imposed, the court must decide what base term to pick out of the range provided by the legislature and – if more than one offense is involved – whether the terms should be consecutive or concurrent. Cal. Pen. Code § 1170(a)(3), (b); California Rule of Court 420, 425. These choices too are made in the sound exercise of the trial court's discretion. *People v. Burnes*, 224 Cal.App.3d 1222, 1234 (1990); *People v. Gulbrandsen*, 209 Cal.App.3d 1547, 1552 (1989). In making these discretionary decisions, the court is guided by a list of non-inclusive sentencing considerations in the California Rules of Court.[13]

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[13] For example, Rule 421 sets forth "[c]ircumstances in aggravation." Similarly, Rule 423 sets forth "[c]ircumstances in mitigation." The sentencing considerations set forth in these rules are used as a guide in both selecting the base term and choosing between consecutive and concurrent terms. Rule 425(b). Both court rule and case-law establish that these

Thus, the nature of the determinations being made at sentencing are far different from the determinations being made at a sentence enhancement trial. There is a corresponding difference in the procedures used in the two proceedings. For example, the sentencing considerations on which the trial court will rely in exercising its broad discretion need only "be established by a preponderance of the evidence." California Rule of Court 439. Moreover, in contrast to formal sentence enhancement allegations, these sentencing considerations need not be pled. *See People v. Hernandez*, 46 Cal.3d 194, 206 (1988).

In exercising its discretionary sentencing choices, the trial court considers a report prepared by the probation officer. Cal. Pen. Code § 1203(b)(1); California Rule of Court 411(a). This probation report may contain "extra-judicial material" including hearsay; the rules of evidence do not apply to such reports. *People v. Lockwood*, 253 Cal.App.2d 75, 81-82 (1967); California Rule of Court 411.5. Defendant does not have any right to cross-examine the person who prepared the report. *People v. Smith*, 38 Cal.3d 945, 960 (1985). The People also have a limited right to appeal sentences and/or seek review by extraordinary writ. Cal. Pen. Code § 1238(a)(6), (10), and (d).

Under these circumstances, it is perfectly appropriate to apply *DiFrancesco* and *Pearce* and deny Double Jeopardy protection to the typical California sentencing proceeding. Given the trial court's discretion to hear a wide ranging type of evidence and fashion an appropriate

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sentencing considerations are non-inclusive. Rule 408(a); *People v. Gonzales*, 208 Cal.App.3d 1170, 1172 (1989).

punishment by choosing among probation or the range of sentences normally available under the determinate sentencing law, "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' " *Bullington v. Missouri*, 451 U.S. at 443.

This same conclusion does not apply to sentence enhancement trials as they are conducted in California. Where a factfinder hears evidence in a fully adversarial forum, chooses between two – and only two – alternatives, and decides that the state has presented insufficient evidence to establish beyond a reasonable doubt a sentence enhancement, the factfinder has indeed reached "a decision to the effect that the government has failed to prove its case." As such, a finding of insufficient evidence to sustain the enhancement bars a second trial on that allegation. *Burks v. United States*, 437 U.S. at 11.

This is especially true here, where there is no provision for an appeal by the People and where defendant did not successfully attack his underlying conviction on appeal. In either of those situations defendant might not have a legitimate expectation of finality. Here, however, the nature of the determination being made, the constellation of protections afforded the defendant, and the inability of the People to appeal an acquittal, all support a legitimate "expectation of finality" within the meaning of the Double Jeopardy Clause. *United States v. DiFrancesco*, 449 U.S. at 139. Thus, Double Jeopardy should apply.

The state court reached a contrary result for three reasons. First, it believed *Bullington* applied only to capital cases. *People v. Monge*, 16 Cal.4th at 836-837; JA 61.

Second, the court found it relevant that many of the procedural protections applied to sentence enhancement trials in California were statutory in origin. *People v. Monge*, 16 Cal.4th at 836-837; JA 61-62. Finally, the sentence enhancement factfinder was confined to determining whether certain historical facts had been proven rather than whether death was appropriate. *People v. Monge*, 16 Cal.4th at 837; JA 62. None of these distinctions justify providing the state with numerous chances to prove its case.

The first point – that *Bullington* is limited to capital cases – completely ignores *Stroud v. United States*, 251 U.S. 15. As discussed above, *Stroud* held Double Jeopardy inapplicable to a capital case where the sentencing did not have the hallmarks of trial. 251 U.S. at 16-18. *Bullington* did not overrule *Stroud*; it specifically distinguished *Stroud* as a case in which the penalty trial "did not have the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. at 439. *Bullington*'s treatment of *Stroud* cannot be squared with the proposition that *Bullington* intended to create a Double Jeopardy analysis unique to capital cases.

In support of its contrary position, the California Supreme Court relied on this Court's decision in *Caspari v. Bohlen*, 510 U.S. 383. *People v. Monge*, 16 Cal.4th at 841-843. In *Caspari* the question was whether Double Jeopardy barred retrial on a Missouri habitual offender allegation. The Court was careful to note that the only consequence of a true finding on the allegation at issue was that the judge would impose sentence rather than the jury. "A [true] finding . . . shifts the sentencing decision

from the jury to the judge but does not alter the authorized sentencing range." 510 U.S. at 386-387.

Because the case came to the Court on collateral review of a state conviction, the Court faced the threshold question whether relief was barred by the new rule doctrine of *Teague v. Lane*, 489 U.S. 288. *Caspari v. Bohlen*, 510 U.S. at 388-389. The Court observed that as of the date the defendant's conviction became final – January 2, 1986 – a number of lower courts had disagreed whether *Bullington* applied outside the capital context. *See Caspari v. Bohlen*, 510 U.S. at 394-395. Since the merits of this issue were susceptible to debate among reasonable minds, a ruling in defendant's favor would have violated *Teague*. 510 U.S. at 395. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) (differing positions by lower courts supports *Teague* bar). Thus, the Court "had no occasion to decide" the merits of the issue. 510 U.S. at 397.

Given the particular sentence enhancement involved in *Caspari*, the retroactivity bar in that case bears little similarity to the issue here. The defendant there was asking this Court to apply Double Jeopardy to a finding which was missing a critical hallmark of the trial on guilt or innocence. Unlike a guilt/innocence trial, the finding at issue in *Caspari* did not expose the defendant to any additional punishment outside the range otherwise authorized for the underlying offense. A conclusion that Double Jeopardy applied to the non-punitive finding at issue in *Caspari* would not only have ignored a critical fact that makes formal sentence enhancement trials "radically different" from traditional sentencing hearings, but it would have departed from *Specht*, *Chandler* and *Bullington* as well. *See McMillan v. Pennsylvania*, 477 U.S. at 88

(refusing to apply Due Process requirement of proof beyond a reasonable doubt to a factual finding which did not expose the defendant to any additional punishment but "operated solely to limit the sentencing court's discretion within the range already available to it without the . . . finding . . . . ") The retroactivity analysis in *Caspari* does not inform the merits of this case.[14]

The state court's second observation – that many of the procedural protections applied to California sentence enhancement trials are statutory in origin – is of little consequence. It is true that the California legislature has enacted a number of the procedural protections which make the enhancement trial identical to that on the question of guilt or innocence. This is irrelevant to the Double Jeopardy question for two reasons.

First, as *Specht*, *Chandler* and *Boles* make clear, many of these protections – such as notice, confrontation and the right to be heard – may be required by Due Process. More important, in *Bullington* itself the state made this

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[14] The state court concluded that because reasonable minds had differed in January of 1986, the decision in this case was also "consistent with constitutional standards." *People v. Monge*, 16 Cal.4th at 842. This misapprehends the nature of a *Teague* retroactivity bar. As this Court has made clear repeatedly, a defendant may be both correct on the merits and barred under *Teague*. *Compare O'Dell v. Netherland*, ___ U.S. ___, 117 S.Ct. 1969 (1997) (*Simmons* claim is *Teague* barred) *with Simmons v. South Carolina*, 512 U.S. 154 (1994) (*Simmons* claim correct on merits); *Lambrix v. Singletary*, ___ U.S. ___, 117 S.Ct. 1517 (1997) (*Espinosa* claim *Teague* barred) *with Espinosa v. Florida*, 505 U.S. 1079 (1992) (*Espinosa* claim correct on merits); *Sawyer v. Smith*, 497 U.S. 227 (1990) (*Caldwell* claim *Teague* barred) *with Caldwell v. Mississippi*, 472 U.S. 320 (1985) (*Caldwell* claim correct on merits).

very argument, pointing out that the beyond a reasonable doubt standard of proof set forth in the Missouri statute was not required by the federal constitution. *Bullington v. Missouri*, No. 79-6740, Brief for Respondent at 10, n.17. Nor was the right to a jury trial at sentencing constitutionally premised. The lesson of *Bullington* is that the Double Jeopardy analysis depends not on the source of the procedural protections, but on their substance.[15]

The state court's final observation – on the factfinder's role – actually makes the case for application of the Double Jeopardy Clause stronger. The state court correctly noted a distinction between the determination made at a California sentence enhancement trial and a Missouri death penalty trial. In the sentence enhancement trial, the factfinder is confined to determining defendant's guilt of a particular allegation. In contrast, at the capital sentencing hearing involved in *Bullington*, the factfinder considers "a broad range of aggravating and mitigating circumstances," determines whether death is appropriate and is permitted to "reject a longer sentence even if its factual determinations support the sentence." *People v. Monge*, 16 Cal.4th at 837; JA 62.

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[15] This approach is entirely consistent with the Court's longstanding practice. That a procedure may not be constitutionally compelled does not mean that if it is provided, it need not meet constitutional standards.

For example, the federal constitution does not require a state to include malice in its definition of murder. *Patterson v. New York*, 432 U.S. 197, 198 (1977). If a state chooses to do so, however, Due Process requires that the state shoulder the burden of proving that element beyond a reasonable doubt. *Id.* at 215-216. *See Mullaney v. Wilbur*, 421 U.S. 684.

Far from distinguishing *Bullington*, these observations actually make the California sentence enhancement trial more like the guilt/innocence trial than the death penalty proceedings involved in *Bullington* itself. Justice Powell's dissent in *Bullington* makes this precise point.

In Justice Powell's view, the statutory scheme in *Bullington* was like more typical sentencing – and unlike a trial on guilt or innocence – precisely because under Missouri law "juries are told that they can ignore the state's evidence." 451 U.S. at 452, n.4. Justice Powell argued that under such a scheme "there is significantly less reason to assume [from an acquittal] that the State failed to prove its case" and "less reason to consider . . . unfair [a] second bite at the apple." *Ibid.*

Justice Powell's observations explain why this is a stronger case than *Bullington* for application of Double Jeopardy. Unlike *Bullington*, the factfinder here was not told it could simply ignore the state's evidence. Thus, it is even clearer in this case that the acquittal necessarily means "that the State failed to prove its case." 451 U.S. at 452, n.4.

None of the reasons put forth by the lower court for refusing to apply *Bullington* are persuasive. Unlike *Pearce*, this case does not involve a new sentencing hearing after a successful appellate attack on the underlying conviction. Unlike *DiFrancesco*, this case does not involve the state's appeal of a sentence.

Indeed, but for the fortuity that the trial court here did not realize the evidence was insufficient, defendant would have been acquitted at trial and the state could not have appealed. As this Court has noted, however, "it

should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient." *Burks v. United States*, 437 U.S. at 11. Here too "it should make no difference" that the appellate court found the evidence insufficient. Whatever the source of this finding, the state is not entitled to ignore it, empanel a second factfinder and try again.

CONCLUSION

The three strikes trial in this case was not a dress rehearsal. The state was given one fair opportunity to offer whatever proof it could on the prior conviction allegation. It should not be entitled to a second, third or fourth. The decision of the California Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

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§ 667. Habitual criminals; enhancement of sentence; amendment of section

(a)(*1*) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(*2*) This *subdivision* shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this *subdivision* to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this *subdivision* by a statute passed by majority vote of each house thereof.

(4) As used in this * * * *subdivision* "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

* * * *(5) This* subdivision * * * shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

Additions or changes indicated by underline; deletions by asterisks * * *

(1) Any offense defined in subdivision (c) of section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

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(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) a conviction in another jurisdiction for an offense that if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense

listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but

shall commence at the time the person would otherwise have been released from prison.

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(Amended by Stats. 1989, c. 1043, § 1; Stats. 1994, c. 12 (A.B.971), § 1, eff. March 7, 1994.)

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§ 1170.12. Prior felony conviction; enhancement

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided

in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) if there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be

made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined as paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any

agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

(Added by Initiative Measure (Prop. 184, § 1, approved Nov. 8, 1994).)

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§ 1192.7. Plea bargaining; limitation; definitions; amendment of section

(a) Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing,

administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) *carjacking;* any attempt to commit a crime listed in this subdivision other than an assault; *and (20)* [sic] *any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense.*

(d) As used in this section, "bank robbery" means to take or attempt to take, by force of violence, or by intimidation from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

As used in this subdivision, the following terms have the following meanings:

(1) "Bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust

company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(2) "Savings and loan association" means any federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any federal credit union as defined in Section 2 of the Federal Credit Union Act.

(3) "Credit union" means any federal credit union and any state-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

(e) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(Amended by Stats. 1986, c. 1299, § 11; Stats. 1986, c. 489, § 1; Stats. 1988, c. 89, § 2; Stats. 1988, c. 432, § 2; Stats. 1989, c. 1043, § 2; Stats. 1989, c. 1044, § 2.5; Stats. 1993, c. 588 (A.B.327), § 1; Stats. 1993, c. 610 (A.B.6), § 16, eff. Oct. 1, 1993; Stats. 1993, c. 610 (A.B.6), § 16.5, eff. Oct. 1, 1993, operative Jan. 1, 1994; Stats. 1993, c. 611 (S.B.60), § 18, eff. Oct. 1, 1993; Stats. 1993, c. 611 (S.B.60), § 18.5, eff. Oct. 1, 1993, operative Jan. 1, 1994.)